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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | | |
|---------------------|---|---|
| JON ARNOLD WOODARD, |) | |
| |) | CASE NO: 3-05-cv-089-TMB-JDR |
| Petitioner, |) | |
| |) | |
| |) | <u>REPLY TO STATE'S OPPOSITION</u> |
| JOHN CRAIG TURNBULL |) | <u>TO EXPANSION OF RECORD AND</u> |
| |) | <u>REQUEST TO DISREGARD OR</u> |
| |) | <u>STRIKE IMPROPER MATERIAL</u> |
| Respondent. |) | |
| _____ |) | |

Defendant, Jon A. Woodard, through his undersigned counsel, Hugh W. Fleischer, hereby files his reply to the opposition of the State's Motion.

The State's Opposition is untimely and is precluded by the Local Rules. This Court should note that the affidavits in question were filed with Mr. Woodard's Amended Petition, dated May 15, 2006 (Docket # 31, dated May 11, 2006 and Docket # 32 is dated September 24, 2005.)

The State did not formally oppose expansion in their Answer dated December 4, 2006, or even when the State filed its Response to Mr. Woodard's Merit Brief, on March 18, 2008.

Moreover, both AK HRC 7.1(b) (4) and 8.1 (b) (3), governing expansion of record and hearings, respectively, preclude the State from opposing such a request by Mr. Woodard.

The State clearly is mistaken that Mr. Woodard was not diligent in pursuing a hearing on shackling in State Court. Not only is the record clear that Mr. Woodard was denied a full and fair opportunity to raise issues related to shackling, but also two judges of the Alaska Court of Appeals ruled that Mr. Woodard was denied the requisite hearing. Reply @ 35-36, Ex. 5 @ 49 and 145.

Furthermore, Alaska post-conviction relief statutes prevented re-litigation of the shackling issue, because the issue was litigated on appeal. See, AS 12.72.020 (a)(2); **Mooney v. State**, 167 P.3d 81 *16-*17 (Alaska App. 2007)

Because Mr. Woodard was denied a hearing in State court, he should be entitled to a hearing in Federal Court, or, at least entitled to expansion of the record to include the affidavits, See, **Jones v. Wood**, 114 F. 3d 1002, 1013 (9th Cir 1997)[When State simply fail to conduct a hearing, Federal Courts are not precluded from granting a hearing.]

In addition to, or as a prerequisite to an evidentiary hearing, Mr. Woodard requests expansion of the record on Ground 8. Under habeas Corpus Rule (HCR)7, a District Court may direct expansion of the record to include any appropriate

materials the enable the Court to dispose of habeas petitions, not dismissed on the pleadings, without the time and expense of a hearing. **Blackledge v. Allison**, 431 U.S. 63, 81-82 (1977). Further, a habeas petitioner may present supplemental materials not considered in State court so long as it does not fundamentally alter the legal claim. **Vasquez v. Hillery**, 474 U.S. 254 (1986).

Mr. Woodard requests to submit the affidavits to clarify the relevant facts. Further, 28 U.S.C. § 2246 allows a judge to receive evidence by affidavit.

As the record indicates, Judge Hunt issued a *sua sponte* order to shackle Mr. Woodard in the presence of the jury, without a request by the State, and without providing Mr. Woodard with a full and fair opportunity for a hearing. Two judges of the Alaska Court of Appeals found such order to be in error-Judge Bryner (prejudicial) and Judge Mannheimer (harmless).

Pursuant to D. AK HRC 8.1(a), "The Court may hold an evidentiary hearing on its own motion..." Further, under D.AK HRC 7.1 (a), "the Court may order expansion of the record...on its own motion..."

Therefore, in the interests of justice, fairness and equity, Mr. Woodard respectfully requests this Court deny the State's motion and issue a *sua sponte* order for an evidentiary

hearing and expansion of the record on Ground Eight (8).

Dated this 19th day of August, 2008.

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CERTIFICATE OF SERVICE

I certify that on the 19th day of
August, 2008, a true copy of the
foregoing was delivered electronically
to the following counsel:

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